

pain and tenderness of the left gluteus maximus as a result of a physical altercation with an inmate. By letter dated June 20, 2003, the Office accepted appellant's claim for left hip bursitis.

Appellant submitted several medical records covering the period June 20 to July 8, 2003 from Dr. Robert D. Strang, an attending Board-certified neurosurgeon, who indicated that appellant sustained a work-related cervical condition caused by an altercation with a prisoner and was totally disabled for work on intermittent dates due to this condition. On June 27, 2003 Dr. Strang requested that the Office authorize him to perform an anterior cervical discectomy at C5-6 with fusion and fixation or artificial disc placement.

In a July 17, 2003 letter, the Office advised appellant that the evidence of record was insufficient to authorize the requested surgical procedure. The Office further advised her about the factual and medical evidence she needed to submit for consideration.

Appellant submitted treatment notes dated August 12 and November 12, 2002 and April 14, May 22 and June 27, 2003 regarding her neck and left hip pain, depression and insomnia. Appellant also submitted a June 4, 2003 magnetic resonance imaging scan performed by Dr. Mark W. Coburn, a Board-certified radiologist, which found moderate to severe neural foraminal narrowing at C5-6.

By decision dated September 5, 2003, the Office denied appellant's request for surgery and declined to expand the acceptance of her claim to include a cervical condition. The Office found that the evidence submitted was insufficient to establish that appellant's cervical condition or the requested surgery were causally related to the April 4, 2003 employment injury.

Appellant submitted letters dated July 8 and 10, 2003 from Dr. Strang which indicated that she sustained a work-related cervical injury and that surgery was scheduled for July 21, 2003.

In a September 25, 2003 letter, appellant requested reconsideration of the Office's September 5, 2003 decision. She submitted numerous documents regarding the April 4, 2003 employment injury, her current and prior cervical conditions and other prior medical conditions and diagnostic test results. Dr. Strang's treatment notes and medical reports covered intermittent dates from April 4 through August 22, 2003. He noted that appellant experienced a cervical condition and depression; she was doing well postoperatively and was disabled for work until she was released with no work restrictions on October 27, 2003. In an October 8, 2003 letter, appellant described how the April 4, 2003 employment injury occurred and contended that this injury resulted in her need for surgery.

By decision dated November 4, 2003, the Office denied modification of the September 5, 2003 decision, on the grounds that the evidence submitted was insufficient to establish that her cervical condition and subsequent surgery were causally related to the April 4, 2003 employment injury.

The Office received Dr. Strang's October 23, 2003 report which noted that appellant continued doing well following the cervical surgery and had no new complaints. He reported his findings on physical and x-ray examination and opined that appellant was able to perform the duties of her position as long as she did not overdo it. Dr. Strang's July 24, 2003 report

described the cervical surgery he performed on July 23, 2003 and provided postoperative diagnoses of C5-6 stenosis, C6 radiculopathy and C5-6 kyphotic deformity. In a November 20, 2003 letter, he opined that appellant's history established that she sustained a cervical spine injury on April 4, 2003 which led to surgery and noted that prior to this injury, she had no such complaints.

On January 23, 2004 appellant requested reconsideration of the Office's November 4, 2003 decision. She submitted a January 22, 2004 x-ray report of Dr. John E. Bartlett, a Board-certified radiologist, which diagnosed an anterior fusion plate at C5-6 with an interbody fusion plug evident at the interspace. Alignment showed mild reversal of the normal cervical curve, but was otherwise intact and the vertebral body screws appeared well positioned. In a January 22, 2004 report, Dr. Strang provided his findings on physical examination and reviewed Dr. Bartlett's x-ray. He stated that appellant was doing well, although she still had occasional paresthesias in the left hand which would take time to resolve. He concluded that she was pain free at that time. Appellant submitted additional factual information regarding the April 4, 2003 employment injury.

On April 26, 2004 the Office issued a decision which denied modification of the November 4, 2003 decision on the grounds that appellant failed to establish that her cervical condition and resultant surgery were caused by the April 4, 2003 employment injury.

In a letter dated April 30, 2004, appellant requested reconsideration. She submitted a May 14, 2004 medical report of Dr. Kathy LeMon, Ph.D, a clinical psychologist, who addressed appellant's difficulties with returning to work at the employing establishment following the April 4, 2003 employment injury. She diagnosed chronic post-traumatic stress disorder due to the April 4, 2003 employment injury. Dr. LeMon stated that appellant would continue to be treated to resolve this trauma and to manage her medications. Dr. Strang's October 23, 2003 diagnostic report indicated that appellant had displacement of the cervical intervertebral.

In an October 27, 2004 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was of an irrelevant and a repetitious nature. The Office noted that if appellant wished to expand the acceptance of her claim to include an emotional condition, her case would be returned to an appropriate claims examiner for consideration.

Appellant requested reconsideration by letter dated February 14, 2005 accompanied by Dr. Strang's August 23, 2004 letter. He stated that whether appellant had any preexisting cervical issues particularly, paresthesias in 1999, was of no consideration. Dr. Strang further stated that the April 4, 2003 employment injury was a new injury and that anyone with preexisting disease would be expected to have a new cervical pathology with the mechanism of the injury appellant sustained. He concluded that the accepted employment injury caused the need for surgery.

By decision dated May 13, 2005, the Office denied appellant's request for reconsideration without a merit review on the grounds that the evidence submitted was of a cumulative nature.

In a September 1, 2005 letter, appellant requested reconsideration. She submitted Dr. Strang's July 25, 2005 letter. Dr. Strang found that she sustained a cervical injury on April 4, 2003 as a result of an altercation with an inmate. He stated that this injury was separate from any preexisting cervical pathology she may or may not have had as it was new. Dr. Strang stated that there was no reason for the denial of appellant's claim as her work-related injury and the mechanism and pathology of her injury were clearly documented in the record. He noted that he had not received any response from the Office regarding his offer to submit additional information regarding appellant's claim.

By decision dated September 28, 2005, the Office stated that appellant's reconsideration request was dated September 1, 2005 and, therefore, filed more than a year after the Office's April 26, 2004 decision and was untimely. The Office also found that appellant did not submit any evidence establishing clear evidence of error in the prior decisions rejecting her claim.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.³ Pursuant to this section, if a request for reconsideration is submitted by mail, "the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as, but not limited to, certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date." Otherwise, the date of the letter itself should be used."⁴

Section 10.607(a) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁷ Evidence that does not raise a

¹ 5 U.S.C. § 8128(a).

² *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ 20 C.F.R. § 10.607(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002).

⁵ 20 C.F.R. § 10.607(b).

⁶ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁷ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁰

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹²

ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹³

The most recent merit decision in this case was issued by the Office on April 26, 2004, which denied modification of the finding that appellant failed to establish that her cervical condition and surgery were caused by the accepted April 4, 2003 employment injury. As her September 1, 2005 letter requesting reconsideration was made more than one year after the Office's April 26, 2004 merit decision, the Board finds that it was untimely filed.

The issue for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence establishing that there was an error in the Office's determination that her cervical condition and resultant surgery were not caused by the April 4, 2003 employment injury. The Board notes that this issue is medical in nature. Appellant submitted Dr. Strang's July 25, 2005 letter which reiterated his opinion that she sustained a new cervical injury on April 4, 2003 as a result of an altercation with an inmate. This evidence is not sufficient to shift the weight of the evidence in favor of the claim. Dr. Strang's opinion is repetitive of his prior reports that were previously considered by the Office. This evidence does

⁸ *Richard L. Rhodes*, 50 EAB 259, 264 (1999).

⁹ *Leona N. Travis*, *supra* note 7.

¹⁰ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹² *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹³ *Larry L. Litton*, 44 ECAB 243 (1992).

not shift the weight of evidence in favor of the claim. Therefore, the Board is unable to find that the Office erred in denying appellant's reconsideration request.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 15, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board